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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 287

VICTOR RABINOWITZ, ET AL., PETITIONERS

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The majority and dissenting opinions in the court of appeals (R. 26–34) are reported at 318 F. 2d 181.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1963 (R. 34–35), and a timely petition for rehearing was denied on May 1, 1963 (R. 35–36). The petition for a writ of certiorari was filed on July 19, 1963, and granted on October 14, 1963 (R. 36; 375 U.S. 811). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioners, a firm of attorneys representing the Cuban government, brought this action against the Attorney General for a judgment declaring that they are not subject to the registration requirements of the Foreign Agents Registration Act. They allege that their activities come within a statutory exemption for persons engaged only in private and non-political financial or mercantile activities in furtherance of the bona fide trade or commerce of a foreign principal. The questions presented are:

1. Whether petitioners have made the showing required for equitable relief—that a prosecution for non-registration would constitute irreparable harm.

2. Whether petitioners' complaint constitutes a suit against the United States without its consent.

STATUTES AND REGULATIONS INVOLVED

The Declaratory Judgment Act, 62 Stat. 964, as amended, 28 U.S.C. 2201, pertinent portions of Sections 1, 2, 3, and 8 of the Foreign Agents Registration Act of 1938, 52 Stat. 631, as amended, 22 U.S.C. 611, *et seq.*; 28 U.S.C. 507, and portions of the Rules and Regulations governing administration of the latter Act, 28 CFR 5.1 *et seq.*, are set out in the Appendix, *infra*.

STATEMENT

Petitioners, attorneys engaged in the practice of law, instituted this action in the United States District Court for the District of Columbia against the Attorney General for a "judgment declaring that their

activities as legal representatives for the Republic of Cuba do not subject them to the requirements of registration under the Foreign Agents Registration Act of 1938, as amended" (22 U.S.C. 611 *et seq.*) (R. 3–7). Section 2(a) of the Registration Act provides that "No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement * * * or unless he is exempt from registration under the provisions of this [Act]" (App., *infra*). Section 3 of the Act exempts various classes of persons from the registration requirements, including "any person engaging or agreeing to engage only in private and nonpolitical financial or mercantile activities in furtherance of the bona fide trade or commerce of such foreign principal * * *" (App., *infra*).[1] The Attorney General is responsible for prosecuting violations of the Registration Act pursuant to Section 8(a)(1) which makes willful violation punishable, upon conviction, by a fine of not more than $10,000 or by imprisonment for not more than five years, or both (App., *infra*). No other method of enforcement is provided.

Petitioners' complaint (R. 3–18) alleged that in September 1960 the government of the Republic of

[1] Petitioners quote (Br. 3) the statute as it read prior to an amendment in 1961 (Act of October 4, 1961, 75 Stat. 784) which narrowed the terms of the exception. The section previously provided: "Any person engaging or agreeing to engage only in private, nonpolitical, financial, mercantile, or other activities in furtherance of the bona fide trade or commerce of such foreign principal * * *" (22 U.S.C. (1958 ed.) 613(d)).

Cuba retained their firm "to represent in the United States the Republic of Cuba and its governmental agencies in legal matters, including litigation, involving the mercantile and financial interests of the Republic of Cuba" (R. 3–4); and that since that time, petitioners have been acting as the legal representative of the Cuban government (R. 5). Petitioners alleged that their retainer does not cover advice or representation involving public relations, propaganda, lobbying, or political or other non-legal matters, that they have not advised, represented or acted on behalf of Cuba in any such matters (R. 4), and that accordingly their activities are specifically exempted from the requirements of registration by the "trade or commerce" exemption in Section 3(d) of the Act (R. 5).

Petitioners' complaint asserted further that the Attorney General "demanded [and has continued to demand] that the plaintiffs individually and as a law firm" register under the Act (R. 4); that registration would require public disclosure by themselves, their employees and any associate counsel whom they might retain in connection with litigation, not only of their relations with the Cuban government but also of "numerous private, personal and business affairs unconnected with [such] representation" (R. 4); and that such disclosure will result in a serious invasion of their privacy which will seriously interfere with their practice of law since other lawyers whom they will wish to employ or retain may refuse to accept such employment or retainer at the price of incurring a similar invasion of their privacy (R. 5). The com-

plaint stated that petitioners have no administrative remedy and no adequate remedy at law; that "they are faced with the dilemma of either registering, although not legally required to do so, or incurring indictment, prosecution and possibly even conviction, for refusing to register"; and that "[i]ndictment and prosecution, even without more, will seriously damage [petitioners'] reputation and interfere with their practice of law and their ability to employ and retain associate counsel" (R. 5).

Petitioners attached to their complaint copies of two printed forms supplied by the Department of Justice for the use of registrants under the Act:[2] Form FA–2 (R. 7–15) to be used by partnerships, corporations, associations and other organizations and groups required to register, and the "short form," FA–4 (R. 16–18), for use by officers, directors, partners, or associates of organizations required to file Form FA–2 as well as by persons who render services or assistance to such organizations for or in the interests of a foreign principal. Form FA–2 advises that all items are to be answered; that where the answer to an item is "none" or "inapplicable" the registrant should so state; and that if compliance with any requirement of the form appears to be inappropriate or unduly burdensome, the registrant may apply for a complete or partial waiver of the requirement. If any of the information called for by the form is not known

[2] Section 5.203 of the Regulations Governing Administration of the Foreign Agents Registration Act of 1938, as amended, provides that every person required to register shall use one of the two forms (28 C.F.R. 5.203).

and cannot be readily ascertained, registrants are advised to indicate this fact and to state briefly the reasons why the information cannot be obtained (R. 7).

The Attorney General's answer (R. 19–21) alleged, *inter alia*, that the court was without jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief could be granted (R. 19). He admitted petitioners' allegation that he had demanded that they register, but denied that registration would require petitioners, their employees or associate counsel publicly to disclose any of their private, personal and business affairs unconnected with the petitioners' representation of the Republic of Cuba (R. 20).

The Attorney General stated that he was without information sufficient to form a belief as to the truth of petitioners' allegations that their retainer does not cover advice or representation involving public relations, propaganda, lobbying, or political or other non-legal matters and that they have neither advised, represented, nor acted on behalf of Cuba in any such matters (R. 20).

Respondent denied plaintiff's allegations that their activities are specifically exempted from registration by Section 3(d) of the Act (R. 20). In response to petitioners' allegation that, unless they register, "they face indictment and prosecution for violation of the Act," respondent stated only that "any person who wilfully fails to file a registration statement as required by the statute is subject, upon conviction

thereof, to criminal penalties as provided therein" (R. 4, 20). Respondent admitted that the Act does not provide an administrative remedy and averred that Congress has provided an adequate remedy at law (R. 21).

Respondent then moved for judgment on the pleadings (R. 21) which motion the district court denied without opinion (R. 22). On the government's appeal under the Interlocutory Appeals Act (28 U.S.C. 1292(b)) (R. 23), the court of appeals, in an opinion by Judge Wright (Judge Fahy dissenting), reversed. The court held that the suit was "[i]n effect * * * an effort to restrain the Attorney General from prosecuting [petitioners] under the Act"; that there had been no consent to suit by the United States; and that the action was maintainable, if at all, only if petitioners' claims fell within the rule stated in *Ex parte Young*, 209 U.S. 123, and reiterated in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682 702, and *Malone* v. *Bowdoin*, 369 U.S. 643, 647, "that an officer of the United States may * * * be sued in his individual capacity where the officer's action is 'not within the officer's statutory powers or, if within those powers, only if the powers or their exercise in the particular case, are constitutionally void'" (R. 27–28). Upon finding that petitioners had failed to challenge the constitutionality of the Registration Act, on its face or as applied, or the authority of the Attorney General to enforce it, the court ordered the case dismissed on the pleadings

as an unconsented suit against the United States (R. 29). Judge Fahy, dissenting, would have held that the action is within the exception to the doctrine of sovereign immunity for suits against officials acting in excess of their statutory authority (R. 29–34).

On May 1, 1963, the court of appeals, *en banc*, denied a petition for rehearing (R. 35).

SUMMARY OF ARGUMENT

Petitioners, attorneys engaged since 1960 in representing the Republic of Cuba, brought this action against the Attorney General for a judgment declaring that they are exempt from the registration requirements of the Foreign Agents Registration Act. They claim that a prosecution for non-registration would injure their reputation and interfere with their ability to practice law and that compliance with the Attorney General's demand for registration would invade their privacy and make it difficult to retain co-counsel. This effort to obtain a civil test of the obligation to register is contrary to the statutory plan of the Act which envisions full and immediate disclosure enforced by criminal sanctions. Action by equity is unwarranted since petitioners have not demonstrated the threat of irreparable injury or alleged that the Registration Act is unconstitutional or that the Attorney General lacks authority to bring a prosecution. The court of appeals properly held that the suit should be dismissed as an unconsented action against the United States.

I

The design and purpose of the Registration Act indicate that Congress intended to make a defense to a criminal prosecution the exclusive means of testing the obligation to register. The Act, passed in 1938, represented a new type of legislation designed to force prompt public disclosure by persons being supplied from abroad with funds and other materials to influence the external and internal policies of the Nation. Congress required every person acting as an "agent, servant, representative, or attorney for a foreign principal" to file a registration statement "forthwith" supplying pertinent information as to their activities and employers. To achieve the objective of full and immediate disclosure, Congress provided substantial criminal penalties for noncompliance with the statute. It did not authorize a civil action by persons who question their obligation to register. Numerous amendments since 1938 have seen no change in the basic framework or purpose of the statute.

Petitioners' suit is in conflict with the Congressional purpose of full and immediate disclosure. If maintainable, foreign agents would be able to conduct their activities for years, as petitioners have been doing, without registration, pending a judicial determination that their activities bring them within the Act. The public would be denied the facts at the time when they are relevant to the formulation of opinion.

II

Petitioners have not made a sufficient showing to justify intervention by a court of equity.

A. Petitioners contend that the Court should exercise jurisdiction to grant relief in this declaratory judgment action because the standard prerequisites of justiciability are met. *Great Lakes Co.* v. *Huffman*, 319 U.S. 293, 300, makes clear, however, that the denomination of an action as one for a declaratory judgment does not "deprive courts of their equity powers or of their freedom to withhold relief upon established equitable principles." The Court held that the considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure. The same considerations apply here. Indeed, petitioners' suit, although labelled one for declaratory judgment, would have only one effect, to bar prosecution.

B. It is a general rule that equity will not intervene to prevent the enforcement of a criminal statute even though unconstitutional. This rule rests partly on the limited office of courts of equity. To restrain against the proceedings for the punishment of offenses "is to invade the domain of the courts of common law, or of the executive and administrative department of the government." *In re Sawyer*, 124 U.S. 200, 210.

The only exceptions to this traditional rule are cases in which the complainant meets two strict requirements. He must show not only that the prosecution

will subject him to irreparable injury but also that the statute on which the prosecution is founded is unconstitutional or that the administrative order triggering prosecution is in excess of the statutory authority. If he fails on the first point, there is no jurisdiction in equity. If he fails on the second, the suit is barred by sovereign immunity as the court below held.

Petitioners do not meet either requirement.

1. Petitioners have not shown irreparable harm. They have been representing the Republic of Cuba for over two years and are presently liable to prosecution. The defense they seek to raise here will be equally available in any criminal trial. Non-registration is a single offense and the continuation of their activities will not cumulate the potential penalties.

Petitioners claim that the stigma which will flow from indictment and prosecution, even assuming acquittal, will damage their reputation and impair their future ability to practice law. These allegations do not make out the "danger of irreparable injury 'both great and immediate.'" *Douglas* v. *City of Jeannette*, 319 U.S. 157, 164. Equity will not intervene where the complainant faces prosecution for acts already committed and continuing without interference, merely to afford protection from the stigma of a criminal prosecution. *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89. To constitute irreparable harm the complainant must show that noncompliance would lead to multiple prosecutions with cumulative penalties for a single course of conduct.

Petitioners also allege that the damage to be anticipated from indictment and prosecution is so great that they will be forced to register—barring action by equity—and that registration will irreparably injure them by invading their privacy and making it difficult to obtain associate counsel whose privacy would also be invaded. These allegations do not constitute irreparable harm. Compliance would not put petitioners out of business or force them to pay confiscatory rates, for example. Indeed a scrutiny of the registration forms and the rules and regulations promulgated pursuant to the Act suggest that petitioners' conclusory allegations of harm are seriously inadequate. The information to be disclosed is simple. Certain questions are obviously inapplicable to a law firm. There is no certainty that petitioners would ever be required to answer all the questions on the statement, since the instructions provide that waivers may be obtained eliminating the need to answer "inappropriate or * * * burdensome" requirements. Petitioners have made no such requests. The absence of serious hardship is indicated by the fact that in the 26 years since passage of the Act some 1,675 individuals and firms have registered. Presently over 94 law firms and individual attorneys have statements on file showing that they are active foreign agents. These disclosures do not appear to have interfered with their practice of law.

2. In addition to their failure to show irreparable harm, petitioners' allegations do not meet the other condition prerequisite to equitable relief. Although peti-

tioners allege that the threat of prosecution and penalties for noncompliance is so serious that they will be forced to register, they do not assert that this constitutes an unconstitutional denial of judicial review, as in *Ex parte Young*, 209 U.S. 123. Their contentions that they are exempt from the registration requirements do not establish that the Attorney General lacks authority to bring a prosecution. 28 U.S.C. 507 charges the Attorney General with enforcement of the criminal laws and this authority includes the power to interpret the laws and decide when a prosecution is warranted. Since petitioners' suit would interfere with the Attorney General's performance of his official duty to prosecute criminal offenses, and since there is no allegation that he is threatening to go outside this statutory duty or his constitutional authority, the suit was properly dismissed as an action against the United States barred by the doctrine of sovereign immunity.

(*a*) It is part of the Attorney General's official duty to prosecute criminal offenses under the laws of the United States. His performance of that duty is an action of the United States. The relief sought would interfere with this action. It is, therefore, a suit against the United States without its consent, barred by the doctrine of sovereign immunity.

(*b*) The suit does not fall within either of the recognized exceptions of the doctrine of sovereign immunity; *i.e.*, that a suit against a government official becomes one against him as an individual if (i) the official exceeds his statutory authority, or (ii) that authority or its exercise is constitutionally void. As

to the first exception, petitioners assert that the Attorney General exceeded his authority in demanding their registration since their representation activities are limited to the mercantile and financial interests of the Republic of Cuba and, therefore, entitle them to exemption under Section 3(d) of the Act. Even if they were right as to the exemption, this would only establish that, if the Attorney General seeks an indictment, his action would be based upon "an incorrect decision as to law." This is not enough to avoid the bar of sovereign immunity. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 683, 695. Petitioner has not made and could not make the required "affirmative allegation of any relevant statutory limitation upon the [Attorney General's] powers" to construe the statutes and apply them to the facts before him (R. 32). His power is to decide when and when not to bring a criminal prosecution, and his authority to decide would not be vitiated by proof that his decision, while bona fide, was erroneous.

Nor is there any basis for bringing this case within the second exception of the doctrine of sovereign immunity. As noted, petitioners do not claim that the Registration Act or the penalties provided for its enforcement are unconstitutional.

(*c*) The cases cited by petitioners in which relief has been afforded against the government fall within the exceptions to the doctrine of sovereign immunity stated in *Larson* v. *Domestic & Foreign Corp., supra*. Nor is there any basis for petitioners' argument that the doctrine is to be applied only where the suit brought involves government property. In each of

the cases cited, there were allegations that the government official or agency was acting in excess of its authority or the administrative action was in violation of specific constitutional guarantees. Similar allegations have not and cannot be made here.

To the extent that any of these cases may indicate a more liberal rule of the reviewability of final administrative action, they depend upon circumstances which are not present here. Each involved final administrative action implemented by an official order which was alleged to be in excess of authority but which was otherwise nonreviewable. The fact that judicial review was upheld in those circumstances does not establish that it is proper here, that the doctrine of sovereign immunity applies only where government property is at issue, or that the doctrine has no application in this case. We have found no case in which the Court has upheld jurisdiction—absent traditional bases for exception to sovereign immunity—where the action complained of was the bringing of a criminal prosecution in which the defendant could fully litigate all his claims and defenses.

ARGUMENT

INTRODUCTION

The Foreign Agents Registration Act is a disclosure measure. Its effectiveness depends upon prompt registration by persons acting as agents of foreign principals. To insure this prompt action, Congress has specifically required the filing of a registration statement before acting as such agent or within 10

days after becoming such an agent (Section 2(a), App., *infra*) and made failure to file punishable as a felony by a fine of up to $10,000 and imprisonment of 5 years (Section 8(a), App., *infra*). Consistent with this purpose, Congress made no provision for testing the obligation to register except in defense to a criminal prosecution. The possibility of protracted civil proceedings (such as those represented by this case) in which a person could contest his obligation to register while carrying on his activities in behalf of the foreign principal is repugnant to the purpose of the legislation "to prevent secrecy as to any kind of political propaganda activity by foreign agents."[1]

Petitioners have been engaging in activities in behalf of the Cuban government for over two years without registration. If their suit constitutes an attempt to obtain immunity from prosecution for these past and continuing activities, it is directly contrary to the statutory purpose. If maintainable, it would give private individuals the power to delay compliance with this prohibitory statute with criminal sanctions until a court issues, in effect, a cease and desist order. On the other hand, if petitioners are not contending that their action gives them immunity, the action is merely an attempt to add a civil forum to the criminal forum presently available to the government. Du-

[1] Mr. Justice Black, dissenting, in *Viereck* v. *United States*, 318 U.S. 236, 249, 250, quoting from the reports of the Senate and House Committees which considered the Foreign Agents Registration Act of 1938. S. Rep. No. 1783, 75th Cong., 3d Sess., H. Rep. No. 1381, 75th Cong., 1st Sess.

plicate proceedings on the same issues would be the result.

We shall show below that, if the purpose of the legislation is to be accomplished, civil suits may not be maintained to determine in advance whether a particular person is required to register and that the sole method which Congress provided for litigating that issue was by defense to any criminal prosecution for non-registration; that petitioners' effort to upset the statutory plan through a declaratory judgment action must further fail because they have shown no irreparable harm warranting the intervention of a court of equity and no unconstitutional or unauthorized action by the Attorney General avoiding the bar of sovereign immunity.

I

THE DESIGN AND PURPOSE OF THE REGISTRATION ACT INDICATE THAT CONGRESS INTENDED TO MAKE A DEFENSE TO A CRIMINAL PROSECUTION THE EXCLUSIVE MEANS OF TESTING THE LEGISLATION

The Foreign Agents Registration Act does not authorize a civil action by a person who questions his obligation to register and would like a judicial test of the issue short of a defense to a criminal prosecution for noncompliance. The language of the Act and the legislative history show that Congress acted knowingly and for the purpose of insuring full and immediate disclosure essential to its objective of keeping the people informed of the foreign sources of

information at the time such information is being distributed and received.[4] Its committees affirmatively stated that the "passage of this bill will force propaganda agents representing foreign agencies to come out 'in the open' in their activities, or to subject themselves to the penalties provided in said bill" (H. Rep. No. 1381, 75th Cong., 1st Sess., p. 3, S. Rep. No. 1783, 75th Cong., 3d Sess., p. 2).

The Registration Act was enacted originally in 1938 (52 Stat. 631) as a result of the recommendations of a special committee appointed in the Seventy-Third Congress to investigate "(1) the extent, character, and objects of Nazi propaganda activities in the United States [and] (2) the diffusion within the United States of subversive propaganda that is instigated from foreign countries * * *." On the basis of nine months of hearings in six different cities, this committee found that there were many persons in the United States representing foreign governments who were being secretly supplied with funds and other

[4] Mr. Justice Black stated the purpose of the initial Act as follows in *Viereck v. United States*, 318 U.S. 236, 251 (dissenting opinion):

> Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment.

materials to influence the external and internal policies of the country.[4]

To meet the problem, Congress adopted a new type of legislation[5] aimed solely at the prompt public disclosure of the facts concerning the spreading of public propaganda by foreign agents subsidized from abroad. Every "person"—including an individual, partnership, association, or corporation—"who acts or engages or agrees to act as a public-relations counsel, publicity agent, or as agent, servant, representative, or attorney for a foreign principal" was required to file a registration statement "forthwith" supplying

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[4] The Special Committee, of which Representative McCormack of Massachusetts was Chairman, was appointed pursuant to H. Res. No. 198, 73d Cong., 2d Sess. The Committee rendered its final report on February 15, 1935 (H. Rep. No. 153, 74th Cong., 1st Sess., p. 1), in which it found that "this country has been flooded with propaganda material" (*id.* at 8) from various alien organizations outside the United States, which were "engaged in vicious and un-American propaganda activities" (*id.* at 5) for the purpose of gaining "adherents" (*id.* at 4) and "to influence the political opinions of many of our people" (*id.* at 22), and also to "influence, if necessary and possible, our governmental policies (*id.* at 7). It further found that "all kinds of efforts and influence, short of violence and force, were used to obtain its desired objective, which was to consolidate persons * * * into one group, subject to dictation from abroad" (*id.* at 9). The evils arising from employment of ostensibly legitimate business connections as a "smoke screen" for propaganda activities were called forcibly to the attention of Congress in unequivocal terms.

[5] The Court so characterized the statute in *Viereck* v. *United States*, 318 U.S. 236, 241.

information as to his propaganda activities, employers and the terms of his contracts.[7] Statements were to be brought up to date every six months and a report of activities during the intervening period filed (52 Stat. 631 *et seq.*).

The dominant purpose of the legislation was full and immediate disclosure. The Senate and House Committee reports stated (H. Rep. No. 1381, 75th Cong., 1st Sess., pp. 2–3, S. Rep. No. 1783, 75th Cong., 3d Sess., p. 2):

> We believe that the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda. We feel that our people are entitled to know the sources of any such efforts, and the person or persons or agencies carrying on such work in the United States.
>
> Such propaganda is not prohibited under the proposed bill. The purpose of this bill is to make available to the American public, the sources that promote and pay for the spreading of such foreign propaganda. * * * Propaganda efforts of such a nature are usually conducted in secrecy, which is essential to the success of these activities. * * * *

In order to achieve these objectives, Congress provided criminal penalties for those who disregarded the requirement of registration "forthwith." But providing the public with adequate information also depended upon preventing such foreign agents from avoiding registration, even for a limited time, with-

[7] Persons who were acting as agents at the time the Act took effect were required to register within 30 days (52 Stat. 631).

out the risk of criminal prosecution and punishment. Thus, the objective of requiring immediate disclosure would have been defeated if foreign agents had been left free to avoid registration by bringing civil actions to determine whether their existing activities were within the statute. By the time such civil actions had run their course, the propaganda could have done its job or the agent might have been replaced by another who would be free to relitigate the same issues. In any event, the delay would have denied to the public the facts toward the disclosure of which the entire legislation was directed. Thus, the failure to provide any method for an agent to test in a civil proceeding his duty to register reflected a Congressional intent to preclude such a dilatory device.

The Registration Act has been amended four times, in 1939 (53 Stat. 1246), in 1942, when there was a comprehensive revision and broadening of the statute (56 Stat. 248), in 1950 (64 Stat. 399, 1005), and in 1961 (75 Stat. 784). Its basic purpose, however, remains as stated in the preamble to the 1942 amendments:[8]

> to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be in-

[8] See Statement of "Policy and Purpose," Act of April 29, 1942, 56 Stat. 248–249, reprinted in the notes to 22 U.S.C. 611.

formed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities.

Indeed, the legislative changes emphasize the Congressional purpose of full and immediate disclosure enforced by criminal sanctions. The Act now provides that "No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement * * *," thus indicating that Congress expects to have the information in the public files at the time the agents begin their subsidized activities. A showing of "undue hardship" must be made to obtain an extension of time within which to file (28 C.F.R. 5.201). Foreign agents are to file copies of any political propaganda being disseminated by mail or in interstate commerce within 48 hours of the beginning of the dissemination (Section 4(a), 22 U.S.C. 614(a)). At the same time, the agent must report the nature of the materials being disseminated and the particulars of their distribution (28 C.F.R. 5.401). Registration statements and dissemination reports are to be available for public examination at the Department of Justice each day (Section 6, 22 U.S.C. 616; 28 C.F.R. 5.600).

It is obvious that the present disclosure statute would break down if numerous agents were able to conduct their activities in behalf of foreign governments—as petitioners are now doing and have been doing for over two years—without registration or otherwise complying with the Act, pending a judicial determination whether they are liable to its require-

ments. An agent can always devise a basis for a judicial challenge to his duty to register. If the speed of world events demanded immediate disclosure in 1938, events move many times as fast today. Issues on which foreign governments have retained agents to tell their story in this country—*e.g.*, the independence movement in Katanga Province in the Congo, the struggle of forces in the Dominican Republic—have arisen and disappeared during periods shorter than two years. It was the judgment of Congress that the people are entitled to know the source of information they are receiving on such issues at the time the issues are being debated. Suits such as petitioners', if maintainable, would thwart that determination.

It is also significant, we submit, that Congress has never moved to provide a civil remedy by which foreign agents could obtain an advanced determination of their liability to the registration requirements of the Act. The statute has been in operation for more than 26 years. Hearings have been held on its adequacy.[9] Successive amendments have been made tightening the registration requirements and increasing the penalties for noncompliance.[10] However,

[9] Hearings before Subcommittee No. 4 of the House Committee on the Judiciary, 77th Cong., 1st Sess., on H.R. 6045; H. Rep. No. 949 of the Committee on the Judiciary, to accompany H.R. 6817, 86th Cong., 1st Sess.; Hearings before the Senate Committee on Foreign Relations, 88th Cong., 1st Sess., on S. 2136.

[10] As originally enacted in 1938, the statute provided for a fine of not more than $1,000 or imprisonment for not more than two years or both (52 Stat. 631). The penalties were increased to present levels in 1942 (56 Stat. 248).

there has been no move in the direction of granting civil jurisdiction of disputes over the meaning of the statute or its administration. Were such a step to be taken, it is inconceivable that the Congress would authorize agents to continue their activities pending a final judicial decision, as petitioners are doing here.

In summary, then, the role of the Registration Act is to insure that the people have at their command the facts with which to identify foreign-sponsored activities and publications so that these activities and statements may be wisely appraised at the time they occur. Petitioners' contention would give foreign agents and their principals the power to conceal these facts at the time they are relevant to the formulation of public opinion. In so doing, it would flaunt the obvious will of Congress, the recognized maxim that a court of equity will not intervene where the plaintiff has an adequate remedy at law and the established rule that the government cannot be sued without its consent.

II

PETITIONERS HAVE NOT MADE A SUFFICIENT SHOWING TO WARRANT INTERVENTION BY A COURT OF EQUITY

A. PETITIONERS' ACTION IS PROPERLY JUDGED BY THE EQUITABLE STANDARDS DEVELOPED WITH RESPECT TO SUITS TO ENJOIN A CRIMINAL PROSECUTION

Petitioners have captioned their suit as one for a declaratory judgment (R. 3) and limited their prayer for relief to a request for a declaration "that their

activities as legal representatives for the Republic of Cuba do not subject them to the requirements of registration under Foreign Agents Registration Act * * * and [for] such other and further relief as may be appropriate" (R. 5). Relying upon *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240–241, they argue that the standard prerequisites of justiciability stated therein are met[11] here and, accordingly, that the Court should exercise jurisdiction and grant relief in this case (Br. 23–28). The *Aetna* case, however, does not stand for this proposition. All that the Court held there was that the dispute between the insurance company and its insured over whether a "disability" provision in the policy afforded a waiver of premiums presented a case or controversy within the jurisdiction afforded by the Declaratory Judgment Act. That is not the issue here. We do not dispute that, at least as to petitioners' past conduct, there is a case or controversy. The issue, however (sovereign immunity aside), is whether the circumstances warrant the court's exercise of its equity jurisdiction.

As to this question, *Great Lakes Co.* v. *Huffman*, 319 U.S. 293, 300, makes clear that the denomination of an action as one for a declaratory judgment does not "deprive courts of their equity powers or of their freedom to withhold relief upon established equitable

[11] Petitioners urge (Br. 23–24) that the controversy is definite and concrete; that it touches the legal relations of parties having adverse legal interests; and that a decree that their activities are or are not subject to the Act would end the dispute with finality.

principles."[12] The issue was whether a federal district court should exercise jurisdiction over a taxpayers' suit against the officer charged with administration and enforcement of the Louisiana Unemployment Compensation Law for a declaration that the law as applied to the taxpayers' dredging activities was unconstitutional and void. The Court recognized the traditional rule that courts of equity will not ordinarily restrain state officials from collecting state taxes where state law affords an adequate remedy, a practice that had been sanctioned by Congress in the Judicial Code (50 Stat. 738). The Court found it unnecessary, however, to determine whether the words of the provision—"to enjoin, suspend, or restrain"—might be construed so as to prohibit a declaration concerning the invalidity of the tax (*id.* at 299):

> For we are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure.

The same considerations apply here to petitioners' declaratory judgment action.

Petitioners' suit, although labelled one for a declaratory judgment, would have the same effect as a suit

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[12] The Court emphasized that the House Committee Report on the Declaratory Judgment Act declared that "'large discretion is conferred upon the courts as to whether or not they will administer justice by this procedure.' H.R. Rep. No. 1264, 73d Cong., 2d Sess., p. 2; and see *Brillhart* v. *Excess Ins. Co.*, 316 U.S. 491, 494; Borchard, Declaratory Judgments (2d ed.) p. 312" (319 U.S. at 300).

for an injunction. Indeed, petitioners recognize this. They argue (Br. 27) that a judicial declaration "that the activities of the petitioners are not subject to the Act would end the dispute with finality. It would be binding upon the Attorney General. He would no longer insist on his demand that the petitioners register and the petitioners could continue their activities without the threat of indictment and prosecution." Thus, it is only reasonable that, as in *Huffman*, the need for extraordinary relief should be judged by the same standards applied to injunction suits. The effect of the declaration—and its only effect—would be to bar prosecution.

B. EQUITY WILL NOT ENJOIN A CRIMINAL PROSECUTION WHERE THE PLAINTIFF FAILS TO SHOW BOTH IRREPARABLE INJURY AND THAT THE PROSECUTOR IS ENFORCING AN UNCONSTITUTIONAL STATUTE OR OTHERWISE EXCEEDING HIS STATUTORY AUTHORITY

From earliest times the decisions of this Court have recognized and upheld the rule that equity will not ordinarily enjoin a criminal prosecution. *In re Sawyer*, 124 U.S. 200, 210–211; *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163–164; *Terrace* v. *Thompson*, 263 U.S. 197, 214; see Hart and Wechsler, *The Federal Courts and the Federal System*, pp. 862–864. As Chief Justice Stone stated for the Court in *Douglas* v. *Jeannette*, *supra*, at 163–164:

> It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for

> equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction.

Petitioners argue (Br. 32) that these cases involve state criminal statutes and that the rule has no application where a federal court is asked to enjoin a federal prosecution. Undoubtedly, the sensitive balance of federalism may afford an added reason why equity should stay its hand. However, the rule has no such restricted application. It rests in important part on the limited office of courts of equity as stated in the opinion of Mr. Justice Gray in *In re Sawyer*, 124 U.S. at 210:

> To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offences, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government.

Indeed, the courts have repeatedly refused to enjoin federal officials from prosecuting violations of federal statutes. *E.g.*, *Yarnell* v. *Hillsborough Packing Co.*, 70 F. 2d 435 (C.A. 5); *Ryan* v. *Amazon Petroleum Corp.*, 71 F. 2d 1, 6 (C.A. 5); *Richmond Hosiery Mills* v. *Camp*, 74 F. 2d 200 (C.A. 5); *Sparks* v. *Mellwood Dairy*, 74 F. 2d 695 (C.A. 6); *Board of Trade of Kansas City* v. *Milligan*, 90 F. 2d 855 (C.A. 8).

The only exceptions to this traditional rule of equity are cases in which the complainant meets two

strict requirements. He must show not only that the prosecution will subject him to irreparable injury but also that the statute on which the prosecution is founded is unconstitutional or that an administrative order triggering the prosecution is in excess of the statutory authority. The former requirement must be met to establish jurisdiction in equity. The latter is essential to avoid the bar of sovereign immunity. *E.g., Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 98–100; *Watson* v. *Buck*, 313 U.S. 387, 400–401; *Ex parte Young*, 209 U.S. 123; *Philadelphia Co.* v. *Stimson*, 223 U.S. 605; *Packard* v. *Banton*, 264 U.S. 140. So far as we can discover, equitable relief against the enforcement of a criminal statute has never been granted unless these two requirements have been satisfied.

The petitioners have not met either of these requirements. Their purported showing of irreparable injury is inadequate. They do not allege that the statute is unconstitutional as applied to them and have failed to show that the Attorney General is exceeding his authority in threatening prosecution.

1. Petitioners have not shown irreparable harm

It is plain that petitioners' case here is no different from any suit by an individual threatened with criminal prosecution to enjoin the prosecuting attorney from proceeding against him. Petitioners have been pursuing their activities in behalf of the Republic of Cuba for over two years. If, as the Attorney General believes, they have violated the Registration Act, they are liable to prosecution. They may defend on the

ground that the Act is inapplicable to their activities. Every allegation that petitioners make in this case on this issue could equally well be made in defense to any prosecution in which their liability would turn on the question of statutory interpretation. Their position can in no way become worse. Violation of the statute is a single offense and their continuation of these activities does not increase the penalties to which they are now liable.

Petitioners, in an effort to make out their claim of irreparable harm, allege (1) that the stigma which will flow from indictment and prosecution will seriously damage their reputation and impair their future ability to practice law, even assuming they are acquitted; and (2) that this damage, plus the threat of possible fine and imprisonment, is so great that they will be forced to register—barring action by equity—and registration, in turn, would irreparably injure them by invading their privacy and making it difficult to obtain associate counsel whose privacy would also be invaded. Plainly, these allegations do not make out the "danger of irreparable injury 'both great and immediate'" which the courts have required as one condition to the restraint of a criminal prosecution. *Douglas* v. *City of Jeannette*, 319 U.S. 157, 164.

The cases establish that the mere stigma of a criminal prosecution is not enough. *Fenner* v. *Boykin*, 271 U.S. 240; *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89. In *Spielman*, in the absence of irreparable harm, the Court applied "The general rule * * * that equity will not interfere to prevent the enforcement of

a criminal statute even though unconstitutional" (*id.* at 95). The threat of prosecution under the state's fair-competition statute did not constitute such harm since the statute did not prohibit continuance of the complainant's business or create a serious interference with its operation. The Court concluded that the case "was the ordinary one of a criminal prosecution which would afford appropriate opportunity for the assertion of appellant's rights. * * * [N]othing more than a single prosecution was in contemplation" (*id.* at 96). To the same effect that a single prosecution with liability to traditional penalties of fine and imprisonment does not constitute irreparable harm, see *Douglas* v. *Jeannette, supra; Beal* v. *Missouri Pacific R. Co.*, 312 U.S. 45, 49–50; *Southern Pacific Co.* v. *Conway*, 115 F. 2d 746, 749 (C.A. 9); *Stone* v. *Christensen*, 36 F. Supp. 739, 741 (D. Ore.); *Keegan* v. *State of New Jersey*, 42 F. Supp. 922 (D. N.J.) (three-judge court).

Ex parte Young, 209 U.S. 123, establishes that to show irreparable harm the complainant must allege that noncompliance with the statute would lead to multiple prosecutions with cumulative penalties for a single course of conduct. This was the case in *Philadelphia Co.* v. *Stimson*, 223 U.S. 605 (see *infra*) and in *Evers* v. *Dwyer*, 358 U.S. 202, on which plaintiff relies (Br. 31–32). In the latter case, the Court held that the complainant, a Negro, was entitled to a determination of the merits of his suit for a declaration that a state statute requiring segregated seating on buses was unconstitutional. The Court emphasized that the plaintiff could not use the city's trans-

portation facilities "without being subjected by statute to special disabilities" (*id.* at 204). Had plaintiff disregarded the "special disabilities" he would, of course, have been liable to successive prosecutions and cumulative penalties.

These cases answer petitioners' argument that the stigma of a single prosecution and the threat of fine and imprisonment, even assuming acquittal, alone constitute irreparable harm. Indeed, from the standpoint of their reputation and ability to retain associate counsel, there does not appear to be much difference between petitioners' going into court and stating that the Attorney General has advised them that they are violating a criminal statute and the Attorney General's actually bringing a prosecution alleging the violation. Further, any indictment and prosecution would not reflect on petitioners' honesty or integrity since it would involve only the legal question whether their conceded activities as counsel for a foreign government bring them within the Act's registration requirements—essentially a test case. Even where the stigma attached to prosecution may be a real factor—such as where officers of business concerns are threatened with indictment for alleged antitrust violations—no equity court would enjoin such prosecutions on that ground alone where the same issues of law could be fully litigated in the criminal proceeding.

Thus, whatever claim petitioners may have to a threat of irreparable harm appears to rest not on the presence of criminal penalties (to which they are now liable if their past actions constitute violations of the Act) or on their desire to avoid having to defend against

a single criminal prosecution, but upon the asserted burdens which would be imposed if they determined to register as a means of avoiding the risks of prosecution. These allegations, however, do not constitute irreparable harm as that term is defined by the cases which petitioners cite (Br. 31–32). Thus, in *Adams* v. *Tanner*, 244 U.S. 590, and *Packard* v. *Banton*, 264 U.S. 140, compliance would have put the complainants out of business. In *Adams*, employment agencies obtained the aid of equity in testing a law which made it unlawful to receive a fee for furnishing a person with employment or information leading thereto. *Packard* involved a statutory requirement that persons in the business of carrying passengers for hire put up a $2,500-bond for each vehicle. The cost of the bond would have cut weekly earnings from $35 to $16.50 on each vehicle and obviously made the operation uneconomical. In *Ex parte Young, supra*, plaintiffs alleged that compliance with the regulatory statute would have required the payment of confiscatory rates (209 U.S. at 130).

Compliance with the Registration Act would impose no such burdens. Petitioners' complaint alleges that registration would result in a serious invasion of their privacy, that they would be required to disclose numerous private, personal and business affairs unconnected with their representation of the Republic of Cuba and that compliance would interfere with their practice of law since other lawyers whom they might wish to retain might refuse to accept such employment if it entailed the disclosure of similar information. The inadequacy of these conclusory alle-

gations of irreparable harm is apparent from a scrutiny of the registration forms and the rules and regulations promulgated pursuant to the Act. Without cataloguing all the specifics of the 14 questions on the form for partnerships and the 9 on that for individuals, a brief review will show their reasonable nature and the reasonable manner in which respondent has administered the Act in this respect. On the form for organizations, including partnerships, questions 1, 2, and 4 request merely the name, address, date of organization and names of partners. Question 3 is clearly inapplicable and 5 is probably so."[11] Questions 6 and 7 ask the name of the foreign principal and the nature and purpose of the registrant's activities in its behalf. Question 8 states "Describe briefly all other businesses, occupations, and public activities in which Registrant is presently engaged" (R. 10). The Department has uniformly accepted statements such as "The general practice of law" from firms of attorneys in answer to this question.

Question 9 asks for the name and nature of services of employees and other individuals who render service to the registrant in behalf of the foreign principal. It is easily answered. Question 10 requests information as to the registrant's receipts from and expenditures in behalf of the foreign principal over the previous three-month period. Question 11 requests the

[11] Question 3 is limited to "nonbusiness membership organizations." Question 5 asks for limited data (*i.e.*, name, address, person in charge) concerning "all branches and local units of the Registrant and all other component or affiliated groups or organizations" (R. 8, 9).

registrant to identify speeches, lectures, radio broadcasts and publications made or delivered over the past three to six months. While it is framed in general terms, the Department has limited the request to those speeches, etc., which bear a reasonable relationship to the representation of the foreign principal. Question 12 asks for data concerning the registrant's affiliation or connection with foreign governments or political parties, as well as the registrant's pecuniary interest in or control over other partnerships, corporations, or other organizations. Question 13 calls for information concerning any ownership of or control over the registrant by any organization, groups or individuals and any subsidies received by the registrant from any organization, groups or individuals located in foreign countries. There is no indication that petitioners would have any response to make to these latter two questions, which are obviously framed for organizations other than law firms.

The final question requires the registrant to file copies of any agreement with the foreign principal and of any speeches, publications, etc., identified in answer to Question 11 as having been made or published during the period. It also requires the filing of short form registration statements by the partners and any employees and other individuals who render services or assistance, other than clerical, to the registrant for or in the interests of the foreign principal. The short form (R. 16–18) consists of nine questions which are similar in nature to those described above.

It should also be emphasized that there is no certainty that petitioners would ever be required to answer even all of these questions. Petitioners might well have secured relief, and may still secure relief from any hardship imposed in their case by particular questions. Thus, the instructions for completion of the registration form which are printed on its cover page provide:

> 5. *Answer All Items.*—All items of the form are to be answered. Where the answer to an item is "none" or "inapplicable," so state.
>
> 6. *Inappropriate or Burdensome Requirements.*—If compliance with any requirement of the form appears in any particular case to be inappropriate or unduly burdensome, the Registrant may apply for a complete or partial waiver of the requirement. Applications for such waivers should state fully the reasons why the waiver is desired.
>
> 7. *Information Not Obtainable.*—If any of the information called for by any item of this form is not known and cannot readily be ascertained, so indicate and state briefly the reasons why the information cannot be obtained.

Thus, it was open to petitioners to request waivers of any disclosure item which they believed to be inappropriate or unduly burdensome. However, no such requests were ever made and petitioners have not indicated what specific questions they find objectionable. If petitioners had sought such waivers and demonstrated the inappropriateness of certain questions insofar as their legal representation of Cuba is concerned, relief might have been granted in whole or in part. Since petitioners chose to forego these

procedures, certainly their general objections do not establish irreparable harm.

The absence of any serious hardship as a result of filling out the registration form is shown by the fact that in the 26 years since passage of the Registration Act, 1,675 individuals and firms have filed registration statements and only one prior action has been brought to avoid registration. *Joseph Brownfield and Richmond & Brownfield, Inc.* v. *J. H. McGrath,* Civil Action No. 4050–51 (D.D.C.). The district court (per Judge F. Dickenson Letts) dismissed that suit for injunction and no appeal was taken. Petitioners' assertion that registration would "seriously interfere with [their] practice of law" is substantially refuted by the fact that as of December 31, 1963, over 94 law firms and individual attorneys were registered as active foreign agents. The public files kept by the Department pursuant to Section 6 of the Act reveal that many of the nation's most prominent law firms are included among this group. To our knowledge none of these firms or individual attorneys, nor any of those who previously filed registration statements and have since become inactive as agents of foreign principals, have found that the necessary disclosures subsequently interfered with their practice of law.

2. The action is barred by sovereign immunity because petitioners make no claim that the Registration Act is unconstitutional and no showing that a decision to prosecute them would be in excess of the Attorney General's authority

Even where the complainant shows irreparable injury, he may not enjoin a criminal prosecution if the prosecutor is not exceeding his constitutional or statutory authority. For in the absence of such unconstitutional or unauthorized action, the suit is barred as an unconsented suit against the sovereign.

Congress has charged the Attorney General with responsibility for prosecution for all offenses against the United States (28 U.S.C. 507). Willful failure to register in accordance with the Foreign Agents Registration Act is made such an offense by Section 8(a) of the Act (22 U.S.C. 618(a)). Accordingly, it is part of the Attorney General's official duty to determine when to initiate prosecutions for violation of this statute, as any other, and his action in making this determination is the action of the United States. Petitioners' suit,[14] if successful, would interfere with

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[14] As authority for the district court to hear their complaint, petitioners cite (R. 3) the District of Columbia Code, Sections 11–305 and 11–306, and the Declaratory Judgment Act (28 U.S.C. 2201). But 28 U.S.C. 2201 merely authorizes a court of the United States to render a declaratory judgment in "a case * * * within its jurisdiction." It is not in itself a grant of any jurisdiction which the courts do not have under some other statute. *Shelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671, *Alabama Federation* v. *McAdory*, 325 U.S. 450, 461–462; *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 324, 325. And see, *Ove Gustavsson Contracting Co.* v. *Floete*, 279 F. 2d 912, 914 (C.A. 2), certiorari denied, 364 U.S. 894. The sections cited from the District of Columbia Code add nothing. Section 11–305 says that "in addition to its jurisdiction as a United States district court" the court has other jurisdictions—*e.g.*, as a "state" court or the inheritor of a State court. See, *Kendall* v. *United States*, 12 Pet. 524. Section 11–306 provides that the court shall have cognizance of "all cases in law * * * or in equity."

his performance of this duty by precluding a decision to prosecute them for failure to register. There is no allegation that the Attorney General is threatening to go outside his statutory or constitutional authority. The action is therefore, as the court of appeals held (R. 28 n. 9, 29), a suit against the United States barred by the doctrine of sovereign immunity.

a. This suit is barred by sovereign immunity because the relief sought would interfere with the public administration and would prevent the Attorney General from enforcing the Foreign Agents Registration Act

There is no room for question that petitioners' suit is one against the United States. Indeed, petitioners do not deny this aspect of the court of appeals' holding (see Br. 15). Whether a suit, although nominally directed against an individual officer, is in substance one against the United States is determined by "the essential nature and effect of the proceeding." *Ex parte New York*, 256 U.S. 490, 500, 502. Petitioners, in their complaint, do not purport to seek relief against respondent as an individual or private person. Their sole interest is in obtaining a declaration which, as they state (Br. 27), will be binding on the Attorney General and preclude him from seeking their indictment and prosecution for violation of the Registration Act. The aim of the litigation is to permit them to continue their activities in behalf of the Republic of Cuba without the threat of this allegedly wrongful government action. Thus, the "essential nature" of the action is an attempt to prevent the Attorney

General, in his official capacity, from exercising discretion to enforce the Foreign Agents Registration Act by prosecution.

In holding that such a suit is one against the United States to which it had not consented, the court below correctly applied the principles enunciated in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, reaffirmed in *Malone* v. *Bowdoin*, 369 U.S. 643, and recently reiterated in *Dugan* v. *Rank*, 372 U.S. 609. The suit is against the sovereign if "the judgment sought would * * * interfere with the public administration" or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act" (*id.* at 620). The relief here, if granted, would clearly fall within both categories. It would preclude the Attorney General from enforcing the Registration Act by initiation of criminal proceedings where, in his judgment, willful violations have occurred. It would mean that he could not carry out the direction of the Congress that he prosecute all criminal offenses (28 U.S.C. 507). Indeed, the equity court would be substituting its judgment for the Attorney General's on this vital matter of public administration. To grant the relief would in short accomplish precisely what this Court said could not be done to the sovereign, without its consent: The enforcement of the Registration Act would be "stopped in its tracks." *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. at 704.

b. This suit cannot be construed as one against the Attorney General as an individual

We recognize, of course, that, (1) if the Attorney General exceeds his statutory authority or (2) if that authority or its exercise is constitutionally void, he may be sued as an individual without the defense of sovereign immunity.[15] Neither exception is applicable here.

(1) Petitioners assert that the Attorney General "exceeded his statutory authority" in demanding that they file a registration statement (Br. 12). Their contention rests on allegations in their complaint that their representation activities are limited to legal matters including litigation involving the mercantile and financial interests of the Republic of Cuba and its governmental agencies; that these activities do not fall within the purview of the Act; and that they are specifically exempted by Section 3(d) which provides that the registration requirements shall not apply to:

> Any person engaging or agreeing to engage only in private and nonpolitical financial or mercantile activities in furtherance of the bona fide trade or commerce of such foreign principal * * *.

[15] A suit for specific relief may be maintained against a federal officer as an individual where the acts complained of are "not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void." *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. at 702; *Malone* v. *Bowdoin*, 369 U.S. at 647; *Dugan* v. *Rank*, 372 U.S. 621–622.

However, this question need not be decided here.[16] Even if petitioners were right as to their exemption, the Attorney General has exceeded no statutory limi-

[16] Were this question here, we would show that respondent's view that petitioners are required to register is correct. Section 1(c) of the statute makes the registration requirements specifically applicable to an "attorney for a foreign principal" and there is nothing in the Act which excludes an attorney who confines his activities to representation of the client. Section 3(d) of the Act exempts only those agents whose activities are of the ordinary, private commercial character in furtherance of the bona fide trade and commerce of the foreign principal. As a representative of a foreign government which controls the means of production and commerce within its borders and directly engages in trade and commerce, petitioners' activities in furtherance of these governmental interests are not considered private. Further, attorneys, as any other agents, are entitled to exemption only if their activities do not include "political activity" which is defined in Section 5.100(a)(11) of the Regulations (28 C.F.R. 5.100(a)(11)) to include:

> (ii) [f]urnishing information or advice to, or in any way representing, a foreign principal with respect to any matter pertaining to political or public interests, policies, or relations of any foreign government * * *, or the political interests of such foreign principal, or engaging in other activities in furtherance of such political or public interests, policies, or relations;
>
> * * * * *
>
> (vi) [e]ngaging in any activity to influence the enactment or repeal of any legislation affecting the political or public interests, policies, or relations of a foreign government, a foreign political party, or a foreign principal, or affecting the foreign policies or relations of the United States * * *.

None of petitioners' allegations suggest that they are not retained, for example, to afford legal advice with respect to the enactment of legislation of interest to their clients or to engage in other activities which are deemed "political" by the statute and regulations.

tation in any action taken to date. He has merely advised petitioners that in his judgment their registration is required by the law. In effect, he has given them advance notice that unless they register he will exercise his discretion to seek their indictment for violation of the Act. The statute imposes no duty that he give such notice, but certainly his doing so serves the interests of orderly administration and exceeds no statutory limitation.

Petitioners' real complaint is not with the demand for registration. Rather, their argument is merely that, if the Attorney General seeks an indictment, his action would be based upon "an incorrect decision as to law" with respect to the interpretation of the exemption provision of Section 3(d) of the Registration Act. This is not enough to avoid the bar of sovereign immunity. *Larson* v. *Domestic & Foreign Corp., supra,* at 695. Petitioner has not made, and could not make, the required "affirmative allegation of any relevant statutory limitation upon the [Attorney General's] powers" (R. 32), as the government official charged with enforcement of the criminal laws (28 U.S.C. 507), to construe the pertinent statutes and apply them to the facts before him. The Attorney General's authority is not merely to seek indictments upon a construction of the laws and all the provisions of the Constitution which will ultimately be upheld as correct. He is given the power to bring the matter before a grand jury when in his judgment a violation of the law has occurred. His authority to decide, and to act upon his decision, is not vitiated by

proof that his decision, while bona fide, was erroneous. As in *Panama Canal Co.* v. *Grace Lines, Inc.*, 356 U.S. 309, where equitable relief against the government was denied, "The general construction of the statute is a distinct and profound exercise of discretion * * * [and] the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision" (*id.* at 318).[17]

Any error by the Attorney General in seeking an indictment for a violation of the Registration Act may be corrected before the grand jury or in the course of the ensuing criminal proceedings.

Petitioner's argument (Br. 16) that this reasoning would in effect preclude all judicial review has no merit insofar as the issue presented by this case is concerned. Civil review of the sovereign's exercise of discretion to bring criminal prosecutions is precluded where there is no consent and where the remedy at law by way of defense provides an adequate means of testing all questions. Indeed, if petitioners were correct, every person potentially liable to prosecution could obtain an advance ruling in the equity courts by

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[17] See *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 695, where the Court stated:

> [W]e have heretofore rejected the argument that official action is invalid if based upon an incorrect decision as to law or fact, if the officer making the decision was empowered to do so.

The Attorney General is empowered to decide when and when not to initiate prosecutions.

claiming an erroneous interpretation of law by the Attorney General.

(2) Petitioners have not attempted to bring themselves within the second exception of the doctrine of sovereign immunity by claiming that the statutes which confer authority upon the Attorney General to prosecute willful violations of the Registration Act are unconstitutional or that his exercise of this authority in their case would be unconstitutional. They make no direct attack on the constitutionality of the registration requirements[18] nor of the provisions for the imposition of criminal penalties upon those who willfully refuse to comply. Their complaint does allege that indictment and prosecution would seriously damage their reputation and interfere with their practice of law (R. 5), and they argue this point (Br. 30–31) as a reason why equity should act in their behalf. However, continuing the position taken before the court of appeals (see R. 28 n. 8), petitioners do not attempt to bring themselves within the principle enunciated in *Ex parte Young*, 209 U.S. 123, 147, by arguing that these potential penalties are so severe that they amount to an unconstitutional denial of judicial review and an attempt to make the Attorney General's construction of the Act conclusive.

Indeed, petitioners could not bring this case within the rule of *Ex parte Young*. The holding there that

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[18] *Viereck* v. *United States*, 130 F. 2d 945 (C.A. D.C.), reversed on other grounds, 318 U.S. 236 (see dissenting opinion at 251–252), and *United States* v. *Peace Information Center*, 97 F. Supp. 255 (D. D.C.), suggest that there is no basis for any such contention.

sovereign immunity was no bar depended upon the fact that persons who failed to comply with the rate regulation statute were subject to possible imprisonment (without regard to willfulness) and risked enormous and cumulative fines. Neither risk is present here. Nor is there realistically a basis upon which petitioners could claim that the statute denies them the right to test their legal arguments by continued noncompliance and defense to a criminal proceeding.

c. The doctrine of sovereign immunity was properly applied to this case

Petitioners argue that *Philadelphia Company* v. *Stimson*, 223 U.S. 605, and *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U.S. 177, establish that sovereign immunity does not bar a suit to restrain the executive from exercising his discretion to bring a criminal prosecution (Br. 14–16). These cases, however, merely represent applications of the rule stated in *Larson* v. *Domestic & Foreign Corp.*, *supra*. Thus, *Stimson* involved a dispute over the authority of the Secretary of War under an Act of Congress to draw a harbor line across the company's property and to prevent it from building a wharf on their property beyond that line. The complaint alleged that the Secretary's authority to draw harbor lines had been exhausted prior to the action complained of, that the severe penalties prescribed by Congress for construction beyond any harbor line and the threat of prosecution prevented the company from using the prop-

erty, that this constituted a taking for public use without just compensation, and that any effort to use its property would subject the company to multiple prosecutions (223 U.S. at 617). These allegations represent sufficient claims of unauthorized and unconstitutional action enforced by the threat of multiple prosecutions to lift the bar of soverign immunity. *Shields* presented a similar situation. There the petitioner sued to obtain review of an Interstate Commerce Commission determination that it was an interurban railway. It alleged that the ruling required it to comply with statutory and regulatory provisions which would put it out of business and that each day of noncompliance constituted a separate offense. The ruling was non-reviewable in the course of such criminal proceedings.[19]

[19] The background of the case was this: The Railway Labor Act applies to railways other than the electric interurban ones; the Act directs the Interstate Commerce Commission, upon the request of the Mediation Board, to determine whether a particular line is within the exception. The Commission, upon request of the Mediation Board, held after hearing that the Utah railroad was not an interurban electric railway. The Mediation Board ordered the railroad to post certain notices required by the Labor Act and failure to do so subjected the carrier to criminal penalties, with each day of noncompliance constituting a separate offense. The railroad brought suit against the United States Attorney to restrain him from criminally prosecuting it for violation of the Act, contending that it was in fact an interurban railway and that compliance with the Act would put it out of business. See *Shields* v. *Utah Idaho Cent. R. Co.*, 95 F. 2d 911 (C.A. 10). The government did not challenge the court's jurisdiction to entertain the action (305 U.S. at 183). This Court, holding that the Commission's de-

Nor is there merit to petitioners' argument (Br. 17–20) based upon its reading of *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, and *Stimson* and *Shields*, that the doctrine of sovereign immunity is to be applied only where the suit brought is for specific performance of a government contract, for government funds or for specific property in the possession of the government (Br. 17). *Shields* and *Stimson* afford no support for this contention, resting as they do upon traditional concepts of sovereign immunity. The same may be said for many other cases cited by petitioner (Br. 18–19) and in none of these did the Court enunciate the rule of limited sovereign immunity which petitioner would apply here.

American School of Magnetic Healing offers a good illustration. The school brought suit against the local postmaster alleging that he was holding mail addressed to it pursuant to an order of the Postmaster General which declared that the school was conducting a scheme for obtaining money through

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termination was binding on both the carrier and the Mediation Board and noting that the determination was not otherwise subject to judicial review (305 U.S. at 182, 183), ruled that the carrier "was entitled to resort to equity in order to obtain a judicial review of the questions of the validity and effect of the Commission's determination purporting to fix its status" (*id.* at 184). Thus, as in *Ex parte Young*, the suit to enjoin the criminal prosecution was maintainable because it was the only means by which the railroad could test the legality of the Commission's determination which would have been binding in any criminal action brought against the carrier for noncompliance with the Railway Labor Act.

the mails by false pretenses; that their business was in fact a legitimate one; that the Postmaster General was acting in excess of his statutory authority which was limited to cases of fraud; and that the statutes which purportedly authorized his action were in violation of the Fourth, Fifth and Fourteenth Amendments in that they deprived persons of their property without due process and failed to afford any opportunity to test the legality of the administrative action in the courts. The case was decided on a demurrer by the government which admitted the fact that the school's business was legitimate. Accordingly, the suit was within both exceptions of the doctrine of sovereign immunity—the postmaster was acting in excess of his authority which was limited to the exclusion of fraudulent mail and the statute, pursuant to which he acted, was alleged to be constitutionally void. The fact that the Court did not discuss the sovereign immunity question may suggest that the government conceded its liability to suit. In any event, the decision should afford no support for petitioners' claim that the government has no sovereign immunity except in cases involving disposition of its property.

Harmon v. *Brucker*, 355 U.S. 579, cited by petitioners, is a similar case. There, the complainant alleged that the Secretary of the Army had acted in excess of his statutory authority and in violation of the First, Fifth and Sixth Amendments to the Constitution as well as of Articles I and III in issuing him a discharge in form other than "honor-

able" based in part upon pre-induction activities.[20] The Solicitor General conceded that the Secretary's action could not be sustained if reviewable, but contended that the district court had no jurisdiction in light of the provision of 38 U.S.C. (1952 ed.) 693h that the findings of the Review Board shall "be final subject only to review by the Secretary of the Army" (*id.* at 581). The Court, citing *American School of Magnetic Healing* and *Stimson*, held that jurisdiction to grant relief was available. While the issue was not argued on the basis of sovereign immunity, it seems clear that the claims that the action was constitutionally void as well as in excess of the Secretary's statutory authority bring the case within the exceptions to the doctrine recognized in *Larson*.[21]

[20] The Court concluded that the Secretary's authority to issue discharges (10 U.S.C. 652a) was limited by the statutory provision (38 U.S.C. (1952 ed.) 693h) which provided for review by the Army Board of Review of the exercise of that authority. Section 693h expressly required that the findings of the Review Board "shall be based upon all available records of the [Army] relating to the person requesting such review * * *" (355 U.S. at 582–583). The Court held that the word "records" as there used meant records of military service and that "the type of discharge to be issued is to be determined solely by the soldier's military record in the Army" (*id.* at 583).

[21] Of the other cases cited by petitioners, *Kent* v. *Dulles*, 357 U.S. 116, 129, cited and followed *Stimson*, as did *Service* v. *Dulles*, 354 U.S. 363, 385, 386. The later case of *Vitarelli* v. *Seaton*, 359 U.S. 535, relied upon *Service*. *Chapman* v. *Sheridan-Wyoming Coal Co.*, 338 U.S. 621, went on the ground that the Secretary had not acted in excess of his authority; *Perkins* v. *Elg*, 307 U.S. 325, was a deportation case. There was jurisdiction to test the action by habeas corpus, and the Court allowed a declaratory judgment as an alternative remedy. *Ramspeck* v. *Trial Examiners Conf.*, 345 U.S. 128, also cited, seems to have been based on the Administrative Procedure Act.

We would have a similar case here if petitioners, for example, had alleged that the Registration Act could not constitutionally be applied to require their registration or that a decision to prosecute them would violate some limitation upon the Attorney General's discretionary authority over enforcement of the criminal law. The bar of sovereign immunity necessarily depends on the claims made against the government. Having chosen not to raise a constitutional issue and being without a basis for a claim of any violation of a statutory limitation upon the Attorney General's authority to prosecute, petitioners should not be heard to complain that their suit was treated differently from the cases on which they rely.

To the extent that statements of the Court in cases cited by petitioners, *e.g.*, *Stark* v. *Wickard*, 321 U.S. 288, *Harmon* v. *Brucker*, *supra*, *Service* v. *Dulles*, 354 U.S. 363, *Vitarelli* v. *Seaton*, 359 U.S. 535, suggest a more liberal rule of reviewability of final administrative action, we believe they have application only in the circumstances in which the cases arose. In each of these cases, it was alleged—and found—that final and otherwise non-reviewable administrative action was in excess of the authority granted by the statutes or regulations.[22] Here, no comparable allegations could be made. Whether right or wrong, the At-

[22] Faced with this contention in *Stark* v. *Wickard*, *supra*, at 290, the Court referred to "the familiar principle that executive officers may be restrained from threatened wrongs in the ordinary courts in the absence of some exclusive alternative remedy."

torney General has authority to decide to prosecute and the correctness of his interpretation of the statute upon which the prosecution is founded is fully reviewable. Further, in each of these cases there was formal administrative action culminating in an order. These circumstances afford a basis for judicial review to determine whether the order was authorized. Such a basis is totally lacking where the complaint concerns simply the action of the Attorney General in bringing or not bringing a prosecution. There is no order here. There is not even any formal public action. There is nothing suitable for review.

Even if the cases stand for the proposition that the Court will afford review of final administrative action which interferes with the legal rights of a private party, this in no way suggests the restriction of the doctrine of sovereign immunity for which petitioner contends. Thus, we have found no case in which the Court has upheld jurisdiction—absent the traditional bases for exception to the government's sovereign immunity—where the action complained of was merely the bringing of a criminal proceeding in which the defendant could fully litigate all his claims and defenses.

Further, in none of the cases cited by petitioner was the controlling consideration the subject matter of the suit. The court's attention was directed to the claims asserted as well as the effect which granting the relief sought would have upon the sovereign. Where, as here, the relief sought would operate against the sovereign and interfere with the public administration, suits against government officials have frequently been

held to be barred as suits against the United States, even though property was not involved.[23]

Practical considerations show the need for invoking the doctrine of sovereign immunity here. The statutory arrangement for prompt and full disclosure by foreign agents depends upon the presence of criminal sanctions for those who fail to comply. To allow persons whom the government believes to be required to register to raise their legal defenses in the equity courts will mean years of delay (if pendency of the action precludes prosecution) during which they may continue activities in behalf of their foreign principals without registration. If initiation of the suit leaves the government free to prosecute, duplicate proceedings would result impeding the administration of the law and serving no legitimate purpose. In our view, dismissal of this suit imposes no unwarranted injustice. Petitioners may still seek a hearing before the respondent in accordance with Rule 2 of the Regulations[24] and present the facts upon which they rely in claiming to be exempt from registration. If they should ultimately decide to register, they may seek waivers of

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[23] See *e.g.*, *Louisiana* v. *McAdoo*, 234 U.S. 627, 632 (setting tariff rates); *Rogers* v. *Skinner*, 201 F. 2d 521, 524 (C.A. 5) (official action of Regional Director of Wage-Hour Division); *Ainsworth* v. *Barn Ballroom Co.*, 157 F. 2d 97 (C.A. 4) ("off-limits" order of commander of military base); *Harper* v. *Jones*, 195 F. 2d 705 (C.A. 10) (same).

[24] 28 C.F.R. 5.2 (App., *infra*) provides a procedure whereby the Attorney General will rule upon inquiries concerning "application of the act [which] shall be accompanied by a detailed statement of all facts necessary for a determination of the question submitted * * *." Petitioners never sought to avail themselves of this procedure.

questions which they consider inappropriate or unduly burdensome. If, on the other hand, they maintain their position against registration, then, as with any statute which relies on criminal sanctions for obedience, they may test their defenses in any criminal prosecution which ensues.

Petitioners' attempt to avoid these statutory procedures runs counter to the admonition in *Decatur* v. *Paulding*, 14 Pet. 497, 516—that the "interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief * * *."

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted.

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APPENDIX

1. The Declaratory Judgments Act, 62 Stat. 964, as amended, 28 U.S.C. 2201, provides:

> CREATION OF REMEDY. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

2. 28 U.S.C. 507 provides in pertinent part:

> DUTIES; SUPERVISION BY ATTORNEY GENERAL.
>
> (a) Except as otherwise provided by law, it shall be the duty of each United States attorney, within his district, to:
>
> (1) Prosecute for all offenses against the United States;
>
> * * * * * *
>
> (b) The Attorney General shall have supervision over all litigation to which the United States or any agency thereof is a party and shall direct all United States attorneys, assistant United States attorneys, and attorneys appointed under section 503 of this title, in the discharge of their respective duties.

3. The Foreign Agents Registration Act of 1938, 52 Stat. 631, as amended, 22 U.S.C. 611 *et seq.*, provides in pertinent part:

> SECTION 1 [22 U.S.C. 611].—DEFINITIONS:
> As used in and for the purposes of this subchapter—

(a) The term "person" includes an individual, partnership, association, corporation, organization, or any other combination of individuals;

(b) The term "foreign principal" includes—

(1) a government of a foreign country and a foreign political part;

* * * * *

(c) Except as provided in subsection (d) of this section, the term "agent of a foreign principal" includes—

(1) any person who acts or agrees to act within the United States, as, or who is or holds himself out to be whether or not pursuant to contractual relationship, a public-relations counsel, publicity agent, information-service employee, servant, agent, representative, or attorney for a foreign principal;

* * * * *

(k) The term "registration statement" means the registration statement required to be filed with the Attorney General under section 612(a) of this title, and any supplements thereto required to be filed under section 612(b) of this title, and includes all documents and papers required to be filed therewith or amendatory thereof or supplemental thereto, whether attached thereto or incorporated therein by reference;

* * * * *

SECTION 2 [22 U.S.C. 612]—REGISTRATION STATEMENT; FILING; CONTENTS.

(a) No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement and supplements thereto * * * or unless he is exempt from registration under the provisions of this subchapter. Except as hereinafter provided, every person who is an

agent of a foreign principal on the effective date of this subchapter shall, within ten days thereafter and every person who becomes an agent of a foreign principal after the effective date of this subchapter shall, within ten days thereafter, file with the Attorney General, in duplicate, a registration statement, under oath, on a form prescribed by the Attorney General, * * *. The obligation of an agent of a foreign principal to file a registration statement shall, after the tenth day of his becoming or acting as such agent, continue from day to day * * *.

* * * * *

(b) Every agent of a foreign principal who has filed a registration statement required by subsection (a) of this section shall, within thirty days after the expiration of each period of six months succeeding such filing, file with the Attorney General a supplement thereto under oath, on a form prescribed by the Attorney General, which shall set forth with respect to such preceding six months' period such facts as the Attorney General, having due regard for the national security and the public interest, may deem necessary to make the information required under this section accurate, complete, and current with respect to such period. * * *

* * * * *

SECTION 3 [22 U.S.C. 613, AS AMENDED, ACT OF OCTOBER 4, 1961, 75 STAT. 784]—EXEMPTIONS.

The requirements of section 612(a) of this title shall not apply to the following agents of foreign principals:

* * * * *

(d) Any person engaging or agreeing to engage only in private and nonpolitical financial or mercantile activities in furtherance of the bona fide trade or commerce of such foreign principal * * *;

* * * * *

SECTION 8 [22 U.S.C. 618]—ENFORCEMENT AND PENALTIES.

(a) Any person who—

(1) willfully violates any provision of this subchapter or any regulation thereunder, or

(2) in any registration statement or supplement thereto or in any statement under section 614(a) of this title concerning the distribution of political propaganda or in any other document filed with or furnished to the Attorney General under the provisions of this subchapter willfully makes a false statement of a material fact or willfully omits any material fact required to be stated therein or willfully omits a material fact or a copy of a material document necessary to make the statements therein and the copies of documents furnished therewith not misleading, shall, upon conviction thereof be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both.

* * * * *

4. The Rules and Regulations Governing Administration of the Foreign Agents Registration Act of 1938 (28 C.F.R. 5.1 *et seq.*), provide in pertinent part:

Rule 2 (28 C.F.R. 5.2):

Inquiries concerning the application of the act shall be accompanied by a detailed statement of all facts necessary for a determination of the question submitted, including the identity of the agent, the nature of his activities on behalf of each foreign principal, any activities on his own behalf, and on behalf of any other person, by reason of which registration may be required, the identity of each foreign principal, and an outline of any agreement or agreements under which the agent is acting.

Rule 100 (28 C.F.R. 5.100):

DEFINITIONS.

(a) As used in this part, unless the context otherwise requires:

* * * * *

(11) the term "political activity" includes, but shall not be limited to, any of the following:

* * * * *

(ii) Furnishing information or advice to, or in any way representing, a foreign principal with respect to any matter pertaining to political or public interests, policies, or relations of any foreign government or foreign political party, or the political interests of such foreign principal, or engaging in other activities in furtherance of such political or public interests, policies, or relations.

* * * * *

(vi) Engaging in any activity to influence the enactment or repeal of any legislation affecting the political or public interests, policies, or relations of a foreign government, a foreign political party, or a foreign principal, or affecting the foreign policies or relations of the United States.

* * * * *

Rule 300 (28 C.F.R. 5.300):

BURDEN OF ESTABLISHING AVAILABILITY OF EXEMPTIONS.

In all matters pertaining to exemptions, the burden of establishing the availability of the exemption shall rest upon the person for whose benefit the exemption is claimed.

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